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***Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018)**

Lowell J. Chandler

In *Hawai'i Wildlife Fund v. County of Maui*, the Ninth Circuit held that the plain language of the Clean Water Act provides jurisdiction over indirect discharges of pollutants from a point source into groundwater that is shown to be connected to navigable waters. The court found that studies confirmed pollutants entering the Pacific Ocean were fairly traceable to the County of Maui's sewage disposal wells. In affirming the district court's ruling, the Ninth Circuit held that Maui County violated the Clean Water Act by discharging pollutants into a navigable water without the required permit. The court also concluded the Clean Water Act provided fair notice to Maui County that its actions were prohibited.

I. INTRODUCTION

In 2014, the Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation, and West Maui Preservation Association (collectively “Associations”) challenged that the County of Maui's (“County”) effluent discharges into four injection wells at its sewage plant without a National Pollution Discharge Elimination System (“NPDES”) permit was a violation of the Clean Water Act (“CWA”).¹ The U.S. District Court for the District of Hawai'i granted summary judgment for the Associations, and the County appealed.²

The Ninth Circuit affirmed the district court's decision and granted summary judgment for the Associations on three grounds.³ First, the County's sewage disposal wells were point sources.⁴ Second, the County was violating the CWA by discharging pollutants from its sewage disposal wells into groundwater connected to a navigable water.⁵ Lastly, while the County argued uncertainty exists as to whether the CWA covers indirect discharges, the court found that the plain language of the CWA provided fair notice that the County was violating the Act.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The County's Disposal Wells and the Tracer Dye Study

At its Lahaina Wastewater Reclamation Facility (“LWRF”) the County relies on four injection wells for disposing three to five million

1. Hawai'i Wildlife Fund v. Cnty. of Maui, 881 F.3d 754, 759-760 (9th Cir. 2018).

2. *Id.*

3. *Id.* at 765.

4. *Id.*

5. *Id.*

6. *Id.*

gallons of treated wastewater effluent daily.⁷ Wells 1 and 2 were installed in 1979, and Wells 3 and 4 were added in 1985.⁸ Prior to building the wells, the County was informed that effluent from its disposal wells would reach the Pacific Ocean via groundwater.⁹

In 1973, an environmental review—confirmed in a facility reassessment in 1991—concluded that pollutants from the wells “would then enter the ocean some distance from the shore.”¹⁰ Additionally, the County’s own expert found that “when the wells inject 2.8 million gallons of effluent per day [into the groundwater], the flow of effluent into the ocean is about 3,456 gallons per meter of coastline per day,” equivalent to 800 permanently running garden hoses.¹¹ Further, the Associations submitted studies and expert declarations “establishing a connection between Wells 3 and 4 and the ocean.”¹²

Furthermore, in June 2013, the U.S. Environmental Protection Agency (“EPA”), the Hawai’i Department of Health, and others conducted a study (the “Tracer Dye Study”) on Wells 2, 3, and 4 that confirmed effluent from the wells was reaching the ocean.¹³ With the purpose of gathering data on the “hydrological connections between . . . wastewater effluent and the coastal waters,” the Tracer Dye Study placed tracer dye into the wells and monitored the submarine seeps to see “if and when the dye would appear in the ocean.”¹⁴ The Tracer Dye Study concluded “a hydrological connection exists between . . . Wells 3 and 4 and the nearby coastal waters of West Maui” and that 64 percent of the wastewater from Wells 3 and 4 discharge into the ocean.¹⁵ The County ultimately “concede[d] that effluent from all four wells reaches the ocean.”¹⁶

B. Procedural Posture

The County appealed three of the district court’s summary judgment rulings.¹⁷ First, the district court found that the County, via a groundwater conduit, was indirectly discharging pollutants into the ocean by use of Wells 3 and 4 without a NPDES permit, a CWA violation.¹⁸ Second, although no study confirmed the oceanic connection between Wells 1 and 2, the district court held the County liable for both wells relying on the fact that the County “repeatedly” conceded at the summary

7. *Id.* at 758.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 759.

14. *Id.*

15. *Id.*

16. *Id.* at 758.

17. *Id.* at 759.

18. *Id.* (citing *Haw. Wildlife Fund v. Cnty. Of Maui*, 24 F.Supp.3d 980, 993, 999, 1005 (D. Haw. 2014)).

judgment hearing that effluent from Wells 1 and 2 reached the ocean.¹⁹ Third, the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.²⁰

III. ANALYSIS

Reviewing *de novo*, the Ninth Circuit first reviewed whether the discharges were point sources covered under the CWA.²¹ Next, the court reviewed the County's contention that the CWA only covers point sources that convey pollutants *directly* into the navigable water and not *indirectly*, as the wells do here.²² The court then reviewed the County's contention that its effluent injections are excluded from permitting requirements by the CWA.²³ Lastly, the court reviewed whether the CWA provided sufficient "fair notice" that the County's actions violated the CWA.²⁴

A. Liability Under the CWA

To achieve the CWA's objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," the Act prohibits the "discharge of any pollutant by any person."²⁵ The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."²⁶ A "point source" is defined as "any discernible, confined and discrete conveyance, including . . . well[s] . . . from which pollutants are or may be discharged."²⁷ A polluter may obtain a NPDES permit to exempt its activities from the prohibition of point source pollution.²⁸ A party is found to violate the CWA when it fails to obtain a NPDES permit and "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source."²⁹

1. The Wells Are Point Source Discharges

In reviewing whether the wells are point sources, the court analyzed the definition of nonpoint sources and point sources.³⁰ Nonpoint

19. *Id.* at 759-60 (citing Haw. Wildlife Fund v. Cnty. of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 328227, at *5-6 (D. Haw. Jan. 23, 2015)).

20. *Id.* at 760.

21. *Id.*

22. *Id.* at 762.

23. *Id.* at 765.

24. *Id.* at 767.

25. *Id.* at 760 (quoting 33 U.S.C. §§ 1251(a), 1311(a) (2018)).

26. *Id.* (quoting 33 U.S.C. § 1362(12)).

27. *Id.* (quoting 33 U.S.C. § 1362(14)).

28. *Id.* (quoting 33 U.S.C. § 1311(a), 1342(a)(1)).

29. *Id.* (quoting *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)).

30. *Id.* at 761.

source pollution arises “‘from many dispersed activities over large areas,’ ‘is not traceable [to a single source],’ and due to its ‘diffuse’ nature, ‘is very difficult to regulate through individual permits.’”³¹ The court concluded that the County’s wells were point source pollutants because they were “four ‘discrete’ wells that have been identified and can be ‘regulate[d] through individual permits.’”³²

2. Fairly Traceable Indirect Discharges Are Covered Under the CWA

While the County conceded that its wells were point sources, it contended that to be regulated under the CWA, the point source “must convey the pollutants *directly* into the navigable water.”³³ The County argued that because its wells discharge to groundwater, then “*indirectly* into the Pacific Ocean,” the discharges do not fall under CWA jurisdiction.³⁴ However, the court concluded that all that is necessary to be liable under the CWA is that there be a “*fairly traceable*” connection between the point source and the navigable water, thereby rejecting the County’s argument and the EPA’s position in its *amicus curiae* brief.³⁵

Based on case law in the Ninth Circuit and its sister circuits, the court concluded that CWA liability is not precluded simply because groundwater played a role in delivering pollutants from the wells to the ocean.³⁶ First, the court concluded that, based on Ninth Circuit precedent, it was of “no import to us in *Greater Yellowstone [Coalition v. Lewis]* that the pollutants—as here—had to travel through the ground before ‘eventually, [entering] surface water.’”³⁷ Further, the court pointed to the Second and Fifth Circuits, which have also recognized indirect discharges from a point source to a navigable water results in CWA liability.³⁸

Additionally, the court found Justice Scalia’s plurality opinion in

31. *Id.* (quoting *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013)).

32. *Id.* (quoting *Ecological Rights Found.*, 713 F.3d 502 at 508).

33. *Id.* at 762 (emphasis in original).

34. *Id.* (emphasis in original).

35. *Id.* at 765 (emphasis added).

36. *Id.* at 763 (citing *Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980)).

37. *Id.* at 762 (quoting *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010)).

38. *Id.* at 763 (citing *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding collection of liquid manure into tankers and discharge onto fields where manure directly flows into navigable waters are point source discharges.); *Peconic Baykeeper, Inc. v. Suffolk County* 600 F.3d 180, 188 (2d Cir. 2010) (holding discharges of a pollutant through the air can constitute a point source.); and *Abston Construction*, 620 F.2d at 45 (holding mining sediment basins designed to collect sediment are point sources, “even though the materials [are] carried away from the basins by gravity flow of rainwater.”)).

Rapanos v. U.S. persuasive.³⁹ Importantly, Justice Scalia’s *Rapanos* opinion recognized “[pollutant] discharge into intermittent channels . . . that naturally washes downstream likely violates § 1311(a), even if [point source pollutants] do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”⁴⁰ The court concluded that “Justice Scalia’s plurality opinion demonstrates the County is reading into the statute . . . that pollutants must be discharged ‘directly’ to navigable waters from a point source.”⁴¹ However, as Justice Scalia concluded in *Rapanos*, indirect discharges are also covered under the CWA.⁴²

3. NPDES Applies to Discharge Into Wells Linked to Navigable Waters

The County next contended that its “effluent injections are not discharges into navigable waters,” but are “disposals of pollutants into wells,” which the CWA excludes from NPDES permitting requirements.⁴³ However, the court rejected the County’s contentions, holding that it was urging a “‘construction that the statute on its face does not permit.’”⁴⁴

First, the court disagreed with the County’s argument that NPDES permitting requirements do not apply to well disposals, concluding the plain language of the CWA “clearly” allows “NPDES permits for well disposals” that discharge into navigable waters.⁴⁵ Second, the County’s argument that only the State, not the EPA, has authority to regulate well disposals was dismissed by the court because concurrent authority exists between the state agency and the EPA to determine CWA violations.⁴⁶ Additionally, the court recognized that if a state agency chooses to “sit on the sidelines,” this does not create a “barrier” to a citizens suit to enforce the CWA.⁴⁷ Lastly, the County’s contention that the Act establishes that disposal wells do not require a NPDES permit was rejected by the court because the CWA “‘does not explicitly exempt [well disposal] nonpoint pollution sources from the NPDES program if they also fall within the ‘point source’ definition,’” which was the case here.⁴⁸

39. *Id.* at 764 (citing *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion)).

40. *Id.* (quoting *Rapanos*, 547 U.S. at 743) (emphasis added).

41. *Id.* at 765.

42. *Id.*

43. *Id.* (quoting 33 U.S.C. § 1342(b)(1)(D)).

44. *Id.* (quoting *Carson Harbor Vill., Ltd. V. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001)).

45. *Id.* at 766 (quoting 33 U.S.C. § 1342(b); citing 33 U.S.C. § 1342(a)(1)).

46. *Id.* (citing *Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1010–12 (9th Cir. 2002); 33 U.S.C. § 1342(c)(1)).

47. *Id.* (citing *Taylor Res., Inc.*, 299 F.3d at 1010–12; and *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 949–50 (9th Cir. 2002)).

48. *Id.* at 766 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004)).

B. Due Process' Fair Notice Requirements

The County also argued that the fair notice requirement of due process was violated because well exclusion from NPDES permit requirements is a fair reading of the CWA.⁴⁹ To provide fair notice, a statute, prior to sanctions being imposed, “must first give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.”⁵⁰ However, it “does not demand unattainable feats of statutory clarity.”⁵¹ The court concluded that because the CWA makes clear that discharge of pollutants into a navigable water without a NPDES permit is a violation of the Act, the County had fair notice that its polluting activities violated the CWA.⁵²

IV. CONCLUSION

The court’s holding in *Hawai’i Wildlife Fund v. County of Maui* is a decision that has significant implications for the CWA’s reach and the permitting status of ongoing polluting activities around the country. This holding clarifies that the plain language of the CWA dictates that the CWA has jurisdiction over indirect pollutant discharges from point sources that travel through groundwater or other subsurface flows and reach navigable waters. Additionally, that the court relied on the persuasiveness of Justice Scalia’s plurality opinion in *Rapanos* is significant because what was viewed as a more restrictive reading of the CWA is now effectively read to expand CWA jurisdiction through the use of a causation analysis test.⁵³ Now, regardless of any contrary future interpretation of the CWA by the EPA, as well as the plurality opinion in *Rapanos*, CWA liability in the Ninth Circuit arises when pollution into groundwater is fairly traceable to navigable waters.

49. *Id.* at 767.

50. *Id.* at 767 (United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) (citing *Graynard v. City of Rockford*, 408 U.S. 104 (1972)).

51. *Id.* at 767-68 (quoting United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008); *Planned Parenthood of Cent. and N. Ariz. v. State of Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983)).

52. *Id.* at 767 (citing *Shark Fins*, 520 F.3d at 980; *Garvey v. Nat’l Transp. Safety Bd.*, 190 F.3d 571, 584 (D.C. Cir. 1999); and *Lee v. Eneter. Leasing Co.-West, LLC*, 30 F.Supp.3d 1002, 1012 (D. Nev. 2014)).

53. Bernadette Rappold, *9th Circ. CWA Decision Could Pose New Compliance Risks*, LAW 360 (Feb. 28, 2018), <https://www.law360.com/articles/1015760/9th-circ-cwa-decision-could-pose-new-compliance-risks>.